

VZCZCXRO3843
PP RUEHGA RUEHHA RUEHMT RUEHQU RUEHVC
DE RUEHOT #1586/01 3581840
ZNR UUUUU ZZH
P 231840Z DEC 08
FM AMEMBASSY OTTAWA
TO RUEHC/SECSTATE WASHDC PRIORITY 8909
INFO RUCNCAN/ALL CANADIAN POSTS COLLECTIVE PRIORITY

UNCLAS SECTION 01 OF 02 OTTAWA 001586

SIPDIS

SENSITIVE

E.O. 12958: N/A

TAGS: [PGOV](#) [CA](#)

SUBJECT: NO TIME TO WASTE: PM HARPER BYPASSES PARLIAMENT ON SUPREME COURT APPOINTMENT

REF: OTTAWA 1577

11. (SBU) Summary: On December 22, Prime Minister Stephen Harper nominated Thomas Cromwell as a Supreme Court Justice, bypassing the parliamentary scrutiny for Supreme Court appointments he had earlier championed. Together with his near-simultaneous flip-flop over appointing new senators against long-standing Conservative policy, the PM's burst of pragmatism suggests he is a man in a hurry to put his stamp on federal institutions, and may be unsure how long his government will last. End summary.

REFORM MOMENTUM

12. (U) Under Canada's Constitution, the Governor General appoints Supreme Court justices on the advice and recommendation of the Prime Minister. The Prime Minister must consult Cabinet, but ultimately has the final say on whom to recommend to the Governor General. By convention, the Governor General has no discretion in making appointments. The Constitution does not require any vote in, or consultation with, Parliament or the provinces.

13. (SBU) In response to criticism, prime ministers have begun to allow limited parliamentary participation. In 2004, Liberal then-PM Paul Martin announced the establishment of an ad hoc all-party parliamentary committee to review his choice of justices Rosalie Abella and Louise Charron and to hear testimony from the Minister of Justice concerning the two nominees. However, Conservative then-opposition MPs (of whom Stephen Harper was the leader at the time) denounced the changes as "insufficient," since the process did not allow MPs to interview the nominees directly. In April 2005, PM Martin further allowed an ad hoc advisory committee to review a list of seven names and forward three names to him, from which he would select a candidate to recommend to the Governor General.

14. (SBU) Two weeks after taking office in February 2006, PM Harper provided for more direct access to court candidates. He accepted Justice Marshall Rothstein as the Government's nominee for the Supreme Court from a short-list of three names scrutinized by an all-party ad hoc committee initiated under the previous Liberal government. Furthermore, he also gave a newly constituted Ad Hoc Committee To Review A Nominee For The Supreme Court of Canada the opportunity to question Rothstein in a televised hearing on February 27, the first time in Canadian history that a Supreme Court nominee faced questions from parliamentarians.

15. (SBU) PM Harper boasted that the hearing marked "an unprecedented step towards the more open and accountable approach to nominations that Canadians deserve." The committee nonetheless remained advisory and did not have the power to block the appointment. The PM still had the final choice of whom he would recommend to the Governor General, leading some critics to dismiss the exercise as meaningless. PM Harper described the hearing as an interim process to deal with the pre-existing vacancy in a timely manner, and promised to announce a new "formal mechanism" to govern future vacancies at a later date.

TOO URGENT TO WAIT

¶6. (SBU) In 2008, an all-party panel of MPs charged with narrowing down a list of Supreme Court nominees to replace Justice Michel Bastarache failed to agree on a short-list, after it got bogged down in partisan politics in September. PM Harper announced on the eve of the October 14 federal election his choice of Nova Scotia Court of Appeal Justice Thomas Cromwell as his candidate. The fall election campaign, and then the prorogation of Parliament in December, delayed creation of an ad hoc parliamentary committee to interview Justice Cromwell, however.

¶7. (U) On December 22, PM Harper recommended the appointment of Cromwell to the Governor General, bypassing the Parliamentary hearing process he had championed to scrutinize nominees. In a statement, he cited the urgency of filling the eight-month vacancy as the justification, noting that the Court must have its full complement of nine judges "to execute its vital constitutional mandate effectively." He added that the appointment would also restore regional balance to the Court, and confirmed that the Official Opposition "welcomes" Justice Cromwell's appointment, after he consulted informally with Liberal leader Michael Ignatieff.

¶8. (SBU) Comment: The merit of Cromwell's appointment is not in doubt, but the Prime Minister's decision to bypass the Parliamentary scrutiny process he had championed on the same day as he reversed himself on the appointment of 18 unelected new senators (reftel) appears to reflect a sudden pragmatism as well as a haste to clear the decks should the government fall, underscoring doubts whether -- or how long -- this government will survive. The predictable cries of "hypocrisy" and "lack of principles" from the opposition nonetheless reverberate far less deeply with the public in the midst

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of the holiday season (and the expected first coast-to-coast white Christmas since 1971!) than would normally be the case.
BREESE